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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70–270

THOMAS LYNN PORTER AND LARRY SPEARS, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 70–298

ARTHUR FULLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported (Pet. No. 70–298 App.).

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1971. On May 20, 1971, a petition for rehearing was denied in No. 70–298 and the petition

for a writ of certiorari was filed on June 17, 1971. Mr. Chief Justice Burger extended the time for filing a petition in No. 70–270 to July 2, 1971, and the petition was filed on June 12, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence was obtained or introduced at trial in violation of the Fourth Amendment (both petitions).

2. Whether the trial court erred in admitting the testimony of an expert witness and in refusing to allow introduction of a prior written statement of that witness (both petitions).

3. Whether the trial court erred in refusing to grant a continuance (No. 70–270).

4. Whether the trial court erred in instructing the jury *sua sponte* that petitioners' failure to testify could not support an inference of guilt (No. 70–270).

5. Whether the evidence was sufficient to sustain the conviction of petitioner Fuller (No. 70–298).

STATEMENT

After a jury trial in the United States District Court for the District of South Carolina, petitioners were convicted of conspiracy to violate 18 U.S.C. 1084 and 18 U.S.C. 1952 (Count I), use of interstate facilities to carry on a gambling enterprise in violation of 18 U.S.C. 1952 (Count II), and use of wire communication facilities for the transmission in interstate commerce of wagering information in violation of 18 U.S.C. 1084 (Count III).[1]

[1] A fourth co-defendant, Clyde Troulias, was acquitted on all counts.

Petitioners Porter and Fuller were sentenced to eighteen months' imprisonment on each of Counts I and III, the sentences to run concurrently. Both were sentenced to two years' imprisonment on Count II, to run consecutively to the sentences imposed on Counts I and III; their sentences on Count II were suspended and they were placed on probation for three years. Petitioner Spears was sentenced to concurrent nine-month terms of imprisonment on Counts I and III. He was sentenced to fifteen months' imprisonment on Count II, to run consecutively to sentences on Counts I and III; the Count II sentence was suspended and petitioner Spears was placed on probation for three years. The convictions were affirmed by the court of appeals (Pet. No. 70–298 App.).

Between November 1968 and February 1969, FBI agents conducted a surveillance of the activities of petitioners Porter and Spears in and about two trailers located in Greenville, South Carolina (Tr. 70, 95, 123, 493–498).[2] During this period, petitioners were observed placing numerous calls at five pay telephones located within a three-mile radius of the trailers (Tr. 62–70, 98, 122, 123, 493–494). Telephone records showed that from August 1968 through February 1969 approximately 391 calls were made from these five telephone booths to telephones located at the Birmingham, Alabama, residences of petitioner Fuller and acquitted codefendant Clyde Troulias (Tr. 537–549). Several of these calls were shown to have

[2] "Tr." refers to the transcript of trial proceedings which is on file with the Clerk of this Court.

been made to the residence of petitioner Fuller at the very time agents observed either petitioner Porter or petitioner Spears using one of the five pay stations (Tr. 67, 68, 92, 531–536).

On March 8, 1969, pursuant to warrants, simultaneous searches were conducted of the two Greenville trailers and the Birmingham residences of petitioner Fuller and Troulias (Tr. 70–87, 276–279).

Upon entering one of the trailers, the agents took charge of two constantly ringing telephones and received approximately fifty-six calls from persons wanting to place bets or secure "line" information (Tr. 504–513).[3] Other agents seized a tape recording, various schedules of athletic events, forecasts for and records of athletic contests, ledger sheets, parlay cards and numerous slips of paper containing notations (Tr. 82–87, 123–143). Two of the voices on the tape recording, which contained a discussion of the giving out of wagering information, were identified as those of Porter and Spears (Tr. 586, 615, 622, 628).

When FBI agents attempted to execute the search warrant at petitioner Fuller's residence they were refused entry; the door was locked and had to be forced open (Tr. 280, 354, 377–381, 386–387). An agent went immediately to the bathroom where petitioner Fuller and another individual were standing next to a toilet which had just been flushed (Tr. 381–383). Another agent answered constantly ringing telephones and for approximately one hour received calls from persons identifying themselves by number and requesting line

[3] "Line" information refers to the predicted point spread between teams in athletic contests (Tr. 274).

information (Tr. 280–281, 306–312). Items seized during this search included a large sum of cash, slips of paper with numerical notations and college basketball schedules (Tr. 357–360, 383–385). Similar items were seized during execution of the search warrant at the residence of codefendant Troulias (Tr. 429, 437).

The various items seized during the course of these searches were analyzed by Francis J. Cross, a qualified expert in the field of gambling. At trial, he testified that in his opinion the seized items, which were introduced into evidence, constituted gambling paraphernalia (Tr. 785–786). He was able, through some of the exhibits, to show the exact bets placed on certain games, he was also able to provide specific dates, as well as the overall winnings and losses (Tr. 749–793).

The government also introduced the testimony of one Jack Laufer that he was engaged in the gambling business and that between November 1968 and March 1969 he had placed several bets by telephone with petitioners Porter and Spears in Greenville, South Carolina. He stated he had received "line" information from them two or three times a week and every day during the basketball season (Tr. 449–460).

ARGUMENT

1. Petitioners raise a variety of claims challenging the searches and seizures. These were carefully considered by the court below and properly rejected. No further review is warranted.

a. Petitioner Fuller's contention that there was an insufficient showing of probable cause to support issu-

ance of a warrant for the search of his premises is without merit. An FBI agent applied for the warrant, presenting his affidavit and the affidavit of a fellow agent.[4]

The affidavit (see Pet. No. 70–298, App. 12–18) referred to information, *inter alia,* provided by a confidential informant who had supplied reliable information in the past; the affidavit reported the informant's personal observation that petitioners Porter and Spears were operating a bookmaking establishment from the two trailers in Greenville, and that these petitioners were receiving their "line" information from Birmingham, Alabama. The affidavit further referred to subpoenaed telephone records which indicated approximately seventy-five calls from pay stations near the trailers to petitioner Fuller's residence in Birmingham during January and February of 1969 and that several of these calls were made at a time when either Spears or Porter had been directly observed making such telephone calls.[5]

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[4] There was no impropriety in this procedure in view of the fact that the agent applying for the warrant could have relied in his own affidavit on the observations of a fellow officer engaged in a common investigation. *United States* v. *Ventresca,* 380 U.S. 102. Indeed, the submission of the additional affidavit reflects a careful police concern to provide ample justification for issuance of the warrant, rather than any violation of Fourth Amendment rights.

[5] The subpoenaed telephone records also indicated approximately 259 calls between August 1968 and January 1969 to the residence of Clyde Troulias' sister. All calls made after January 19, 1969, were placed to the Fuller residence, leading the affiant to conclude that the gambling operation had been moved from Troulias' residence to petitioner Fuller's residence (Pet. No. 70–298 App. 17).

The reliability of the information received from the informant that petitioners Porter and Spears were receiving their line information from petitioner Fuller's residence in Birmingham, Alabama, was corroborated by an analysis of telephone company records and the independent surveillance of FBI agents. Based upon this information, a Commissioner could reasonably believe that a gambling operation was being conducted by Fuller and issue the warrant. *United States* v. *Harris,* No. 30, O.T., 1970, decided June 28, 1971; see *Draper* v. *United States,* 358 U.S. 307; *Jones* v. *United States,* 362 U.S. 257; *Aguilar* v. *Texas,* 378 U.S. 108; *Spinelli* v. *United States,* 393 U.S. 410 (1969).

b. Petitioner Fuller contends that it was improper for agents conducting the search of his premises to receive telephone calls. The warrant authorized seizure of "bookmaking records and wagering paraphernalia consisting of, but not limited to, accounting sheets, rundown sheets, betting slips, recap sheets, sports information papers, miscellaneous line notations, line sheets, books of account, checks, money orders, and United States currency * * *." The requirement that a warrant describe with particularity the objects to be seized does not require that an officer overlook evidence which bears a close relation to the purpose of the search and which could not clearly be foreseen at the time of the issuance of the warrant.

Having been authorized to search for gambling paraphernalia, the agents could properly receive calls which were part of the gambling operation. And testimony as to the substance of these conversations was

competent evidence to show the nature and type of operations being conducted on the premises. *United States* v. *Pasha*, 332 F. 2d 193 (C.A. 7); *Armstrong* v. *United States*, 327 F. 2d 189 (C.A. 9); *Reynolds* v. *United States*, 225 F. 2d 123 (C.A. 5).

Petitioners Porter and Spears similarly argue that because the warrant did not specifically describe the tape recording as one of the items to be seized, it should have been suppressed. There was no firm evidence that the agents knew that the tape was on the premises before securing the warrant. The recording was a record of bets kept by petitioners and was thus within the description in the warrant of "bookmaking records and wagering paraphernalia."[6] See *Gurleski* v. *United States* 405 F. 2d 253 (C.A. 5), certiorari denied *sub nom. Smith* v. *United States*, 395 U.S. 981; *United States* v. *One 1965 Buick*, 392 F. 2d 672 (C.A. 6); *Seymour* v. *United States*, 369 F. 2d 825 (C.A. 10), certiorari denied, 386 U.S. 987.[7]

c. Petitioner Spears contends that his Fourth Amendment rights were violated because one of his conversations in a public telephone booth was over-

[6] By determining that certain of the sports events referred to on the tape occurred on February 3, 1968, the government was able to show the relevancy of the recording to the operative period of the conspiracy (Tr. 586).

[7] Petitioners Porter and Spears also argue that the recording was in any event inadmissible because not properly authenticated. They rely, however, upon decisions which set forth requirements for admissibility when the tape is made by or under the supervision of government agents. Here the tape was apparently made by petitioners Porter and Spears since it was discovered on premises used by them for their gambling operations and their voices were identified on the tapes. The authen-

heard by an FBI agent. However, no testimony with respect to the overheard conversation was introduced into evidence. Another agent present at this time merely testified to the presence of Spears in the booth. The agents did not employ electronic or mechanical listening devices to overhear this conversation nor did an agent have his ear pressed against the wall of the booth. The agent who overheard the conversation was standing at least two feet away from the booth which was located in a pharmacy (T. 97–113). The agent's presence in the pharmacy, a public place, near the phone booth where he had every right to be did not abridge petitioner's Fourth Amendment rights within the rule of *Katz* v. *United States*, 389 U.S. 347. See *Ponce* v. *Craven*, 409 F. 2d 621 (C.A. 9), certiorari denied, 397 U.S. 1012; *United States* v. *Llanes*, 398 F. 2d 880 (C.A. 2), certiorari denied, 393 U.S. 1032.

2. There is no substance to the claim that a qualified expert witness who after analysis identified the various items seized as gambling paraphernalia should

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ticity of the tape was established through testimony as to the circumstances of its seizure and its preservation in the same condition as discovered (Tr. 586–588, 590, 594, 604–605, 612–613), as well as evidence that two of the voices on the tape were those of petitioners Porter and Spears. This authentication was a sufficient showing that the tape had been prepared by petitioners and the recording was, therefore, competent evidence against them. Cf. *Hale* v. *United States*, 410 F. 2d 147 (C.A. 5), certiorari denied, 396 U.S. 902; *Spindler* v. *United States*, 336 F. 2d 678 (C.A. 9), certiorari denied *sub nom. Richards* v. *United States*, 380 U.S. 909; *Espinoza* v. *United States*, 317 F. 2d 275 (C.A. 9); *Carbo* v. *United States*, 314 F. 2d 718 (C.A. 9), certiorari denied, 377 U.S. 953.

not have been permitted to testify. The introduction of opinion evidence relative to gambling operations is proper. *Moore* v. *United States*, 394 F. 2d 818 (C.A. 5); *United States* v. *Altiere*, 343 F. 2d 115 (C.A. 7).

Nor did the trial court err in refusing to admit into evidence a prior, allegedly inconsistent statement contained in a report of this witness. This statement, which the trial court found was not inconsistent with the witness' testimony, explained why the witness believed that one of numerous exhibits (Gov. Ex. T. 51) could not be positively identified as gambling paraphernalia. The sentence from the report stating the witness' conclusion was read to the jury three times (Tr. 800–803, 808). The report contained information as to proposed government exhibits which, at petitioner's insistence, was not admitted into evidence (Tr. 780–784, 798–799). Especially in light of the fact that the substance of the allegedly inconsistent statement was before the jury, prejudice to petitioners can hardly have resulted from refusing to admit the entire contents of the report.

3. Petitioners Porter and Spears argue that the trial court erred in refusing to grant them a continuance for the purpose of further analysis of the tape recording recovered from the trailer. On November 5, 1969, a complete disclosure of all items seized was made and petitioners' counsel were given an opportunity to hear and view them. The tape was played for the court and defense counsel at this time and a copy of the tape was tendered to the defense counsel

(H. 7, 33).[8] Moreover, at this time the results of tests made by the government were furnished defense counsel (H. 19). Trial was set for November 17, 1969. At that time petitioners renewed their motion for a continuance on the ground that the expert who was examining the tape required an additional two weeks in which to make further tests (T. 7) as to the "two tone touch system", *i.e.*, a way of determining from the tapes the numbers called on the telephone. Since the government produced no evidence of this sort at trial, it is difficult to see how such an analysis would have benefited petitioners. In fact, the analysis sought by petitioners was completed (Tr. 999); in any event, they made no showing here or in the court below that this analysis would have furthered their defense and, accordingly, no showing that the trial court's refusal to continue the case was an abuse of discretion.[9]

4. It was not reversible error for the trial court on its own motion to instruct the jury that the failure of an accused to testify cannot support an inference of guilt. *Dickinson* v. *United States,* 421 F. 2d 630 (C.A. 5); *United States* v. *Ballard,* 418 F. 2d 325 (C.A. 9); *Bellard* v. *United States,* 356 F. 2d 437 (C.A. 5), cer-

[8] "H" refers to the hearing on the motion to suppress. Volume III of the record of proceedings below.

[9] Petitioners also argue that they had insufficient time in which to examine in excess of 700 items seized. Many of these items were duplicates of other material, reducing the total number of unique items to fewer than eighty-five. These included basketball schedules, bet sheets, betting slips, betting tickets, a few scraps of paper, decks of cards and poker chips, items the full nature of which could be ascertained from a brief examination. As of November 5, 1969, defense counsel had already made a cursory examination of these items (H. 35).

tiorari denied, 385 U.S. 856; *United States* v. *Kelly* 349 F. 2d 720 (C.A. 2), certiorari denied, 384 U.S. 947.

5. Petitioner Fuller's contention that the evidence was insufficient to sustain his conviction is insubstantial. The evidence showed that petitioners Porter and Spears were using five pay telephones in Greenville, South Carolina, in the vicinity of a trailer which was the base of a gambling operation. Telephone company records of numerous telephone calls to petitioner Fuller's residence in Birmingham, Alabama, indicated a continuous contact between the Greenville operation and the Birmingham operation. The sheer magnitude of these calls supported an inference of something more than casual contact. During the search of Fuller's residence, gambling paraphernalia was seized and numerous phone calls were taken; all of this clearly indicated a large scale gambling operation. Moreover, after the necessary forcible entry to Fuller's premises in order to serve the warrant had been accomplished, he and another person were discovered fully clothed beside a toilet in operation; this suspicious circumstance supported the inference that at least some incriminating evidence had just been disposed of. In totality, the evidence was such that a jury could reasonably find that Fuller had engaged in an interstate gambling operation with petitioners Porter and Spears. Petitioner's further claim that there was no evidence of communication between himself and petitioners Porter and Spears is incorrect since the telephone company records indicated continuous communication between them.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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